

HONG KONG / JUDGMENT

# HKSAR v. CHOW KAM YUEN

## COURT

Court of First Instance

## DECIDED

16 May 2007

## CASE / FILE NUMBER

HCMA250/2007

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bjbj HCMA250/2007 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE (Appellate Jurisdiction) MAGISTRACY APPEAL NO.250 OF 2007 (ON APPEAL FROM ESCC 2465 OF 2006)

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BETWEEN HKSAR Respondent and CHOW KAM YUEN ( February 2007 by Mr Shing, sitting at Eastern Magistrates Court, of an offence of offering an advantage to an agent, contrary to sections 9(2)(b) and 12(1) of the Prevention of Bribery Ordinance, Cap.201 and sentenced to eight months imprisonment. AUTONUMOUT The particulars of the offence are that the appellant aided and abetted a person, Lai, to offer an advantage to one Nguyen, a Regional Manager of Wellcome Supermarket, as an inducement to or reward for or otherwise on account of the said Nguyen, showing or having shown favour to a company in relation to the affairs or business of Wellcome Supermarket, namely, the supply of Chinese sausages to Wellcome by the said company. AUTONUMOUT The appellant now appeals against both conviction and sentence. The evidence at the trial AUTONUMOUT At the trial it was admitted that the said Nguyen had the Christian name Thomas and that, after the appellant was arrested a search was conducted by the ICAC of his home and a notebook was found, in whi on video. At the first interview he said inter alia that he knew that Nguyen was probably a manager in the middle level in Wellcome and that he drove a company car. He also said If the specification was not all right, we would not force it, that means, the most important thing is it should be done through proper channels. AUTONUMOUT At the second interview he said inter alia that Lai had said That is for doing business, I will give you a commission in return, and that s it. The appellant said that the commission was paid to Thomas. He said that Lai had said that if his company could enter Wellcome by proper channels, it could be 5% as commission for the salesperson, which could be offered to Thomas. AUTONUMOUT The appellant admitted that he had said to Thomas Hey, how about this, make it 34 dollars, five percent, you take care of it. He said that the 5% was a percentage of \$34. He said that Lai had said to him Hey, it s a common practice in the trade, it was also five percent out there. He said he had no idea what Thomas would do for Lai. He confirmed that the 5% would be paid to Thomas to become a supplier of Wellcome. He said he did not have any advantage and he acted merely as a messenger for his friend. AUTONUMOUT He said that it seemed to be on the day following his

conversation with Lai that he telephoned Thomas. He said to Thomas Concerning those preserved Chinese sausages, forty nine fifty, just give him a twenty percent discount, then it will be 34 dollars, that is, (based on) this 34 dollars, to be paid, five percent will be calculated and treated as a commission. He confirmed that he told Thomas that 5% would be given to him as a commission. He said that Thomas said okay and that was it. He confirmed that to his understanding the 5% would be paid to Thomas himself and that that would be done in private. Grounds of appeal against conviction AUTONUMOUT Burkett, on behalf of the appellant, advanced four grounds of appeal. AUTONUMOUT First of these was that the magistrate, although aware of HKSAR v. Poon Hoi Wing and another [2001] 1 HKC 363, failed to apply it appropriately to his assessment of the interviews of the appellant. AUTONUMOUT Counsel accepts that from the admissions contained in the records of interview, the appellant had agreed to pass on a message. However, counsel submits that it does not follow that the appellant had the intention to assist in a corrupt transaction. That element was found to have been proved by the magistrate after the magistrate drew one of six reasonable and irresistible inferences, namely, that the appellant knew that the offer to Thomas was being made in private and the only reason for making the offer in private was that the appellant knew that Thomas had no permission from Wellcome to receive the secret commission so the appellant knew that the offer was without lawful authority or reasonable excuse. AUTONUMOUT Counsel submits that there was no evidence from which, as the only reasonable one, an inference could be drawn that the appellant must have realised that the passing of the message was unlawful simply because it was being passed privately. I cannot agree with that submission. The appellant admitted in his interviews that he had previously worked together with Nguyen (Thomas) in one company and he had also worked together with Lai in another company, Messrs John D. Hutchison & Co. The appellant admitted that he had worked as a salesman. Given that background of the appellant, I find that the magistrate was entitled to draw the inference that the appellant knew or must have known that the offer he was making to Thomas on Lai s behalf must have been unlawful. The appellant knew that Thomas was working as a manager for a large company such as Wellcome Supermarket and therefore he must have known that Thomas would not have been entitled to receive any commissions. He had admitted in his interviews that he knew that the commission was going to be paid to Thomas. If it was going to be a lawful commission paid either to Thomas or to Wellcome Supermarket, then Lai could have mentioned this openly in his negotiations with either Thomas or somebody else from Wellcome. AUTONUMOUT The second ground advanced by counsel was that there was no basis upon which the magistrate was entitled to find that possibilities in the appellant s favour were untrue and no basis was given by the magistrate for such a finding. The magistrate had considered in the appellant s favour four possibilities, namely :

- (1) he did not know Thomas s position at Wellcome and Wellcome s practice with respect to appointments of suppliers;
- (2) he did not know the details of the discussion between Lai and Thomas;
- (3) he and Lai had emphasised the need to go through the proper channels; and

- (4) he was merely an innocent agent without the intention that the principle offence was to be committed by Lai, labouring as he was under the impression that it was a common and therefore acceptable practice among salesmen or real estate agents to receive commission. AUTONUMOUT The magistrate found that none of these possibilities could have been true, and none of the possibilities, taken individually or collectively, militated against the findings which he considered proved, namely, that the defendant had, by relating Lai's message to Thomas, the intention to assist Lai to secure the Wellcome appointment. AUTONUMOUT Possibility (1) was admitted by the appellant in his interviews and the same applies to possibility (2). Regarding possibility (3) that the appellant had emphasised to Lai that the proper channels should be gone through, in my view, that does not detract from or take away the position that by making a private offer to Thomas of a 5% commission, the offer was itself unlawful even if the proper channels in applying to be a seller to Wellcome were all gone through. The fourth possibility of the appellant thinking that the commission would have been lawful just because some salesmen or real estate agents accepted commission is dealt with by me in the foregoing paragraphs. AUTONUMOUT The third ground was that the magistrate erred in inferring that the offer was unlawful from the discussion being in private and therefore not part of the negotiations with Wellcome. I have dealt with this ground in the previous paragraphs. AUTONUMOUT The fourth ground is that the inference that the appellant knew the offer was unlawful from the finding that he knew it was made in private is not sustainable given the magistrate's earlier findings (which are not criticised) as to what constituted the actus reus of the offence. The magistrate had found that the offer which was the actus reus was a telephone call between the appellant and Thomas. Counsel again makes the point that the conversation on the telephone must have been private, and just because it was private in that sense, it cannot be taken to give a clandestine character to the offer within the message. AUTONUMOUT have dealt with these matters in the foregoing paragraphs. A telephone conversation, by its nature must be private to the two participants of the conversation but the fact that it was a private conversation does not ipso facto make the contents of the conversation unlawful. The magistrate correctly drew the inference that the appellant knew that Thomas had no permission to receive the secret commission, but in my view, the magistrate should not have relied just on the fact that the offer was being made in private to found a basis for that inference. That inference, as I mentioned earlier, could have been drawn in conjunction with the other factors, namely, the appellant had working experience in Hong Kong in various companies and had himself worked as a salesman, and also that the appellant should have realised that if everything was above board, Lai would not have needed him to pass on the message to Thomas. AUTONUMOUT The magistrate found the evidence of the Group Category Manager of the Procurement Department of Wellcome Supermarket to be irrelevant. However, my view is that one of the facts mentioned by him in his evidence, namely, that in August or September 2005, Nguyen had made enquiries of him about Chinese sausages and said that he had a friend who hoped to supply Wellcome with Chinese sausages which originated from Canada, had some relevance to the prosecution's case as a whole. I find that the magistrate was correct to find that the actus reus was the telephone conversation by the appellant to Nguyen and that the principle

offence was in fact completed and committed by Lai the moment the appellant delivered Lai's message to Thomas. AUTONUMOUT In my view, the evidence of the finding of the notebook which had the handwritten entry which indicated that of \$34 Thomas was to get or receive 5% was supportive of the allegation by the prosecution that somebody intended or wanted a person called Thomas to get 5%. It can be said of course that the Thomas could have been a reference to any person, but given the figures mentioned in that entry which tallied with the figures admitted by the appellant in his records of interview, the magistrate could have drawn the inference that the Thomas stated in that entry was Nguyen.

AUTONUMOUT In all the circumstances, I find that the magistrate was correct in his finding that all the elements of the offence had been proved beyond all reasonable doubt. It follows that the appeal against conviction must fail. Appeal against sentence AUTONUMOUT The appellant was sentenced by the magistrate to eight months imprisonment. He appeals against that sentence. AUTONUMOUT In his appeal against sentence Mr Burkett relies on the following factors to avoid an immediate custodial sentence or to reduce the length of any custodial sentence

- (i) The Appellant was no more than the conveyor of a message and would receive no personal gain or benefit. (ii) The appellant's involvement was minimal : he had warned Lai; he took no part in detailed discussions; once he had passed the message his participation and already minimal involvement ceased. (iii) Neither of the principal offenders (Lai and Nguyen who were more culpable than the Appellant) was charged with an offence in respect of this matter. (iv) The offence did not result in any unlawful gain for the principle offenders or loss to Wellcome. AUTONUMOUT The abovementioned matters are in fact all true. At the end of the day, Lai never sold any Chinese sausages to Wellcome and Nguyen never received any commission from Lai. Counsel submits that where the appellant was no more than the messenger, it is wrong in principle to equate his culpability to that of Lai who was the instigator and a beneficiary of the proposed corruption. Counsel criticises what the magistrate had said in his reasons for sentence, namely do not regard it a relevant consideration that the deal was not brought to fruition, as the charge is one of offering an advantage. It matters not whether the offer has caused an effect. I cannot speculate about offenders not before me, so I do not consider it relevant that neither Nguyen nor Lai has been charged with an offence arising from the factual matrix of this case. AUTONUMOUT Counsel relies on the following matters :
- (1) this is the first conviction for the appellant;
  - (2) the scale of the corruption cannot be said to be a grave one;
  - (3) the offer took place only on one occasion;
  - (4) it came to nothing; and
  - (5) no harm was done to any party. AUTONUMOUT agree with the magistrate that the matters he mentioned which are quoted above would be of no relevance, but I do not agree that where one is considering sentence these matters have no relevance whatsoever. The fact

remains that the two principal offenders were never charged, the appellant made the offer on behalf of Lai and that was the only occasion he participated as an aider and abettor. He knew little about the details which Lai would negotiate with Wellcome and he did not stand to gain from his participation in the commission of the offence. AUTONUMOUT Daryanani, appearing for the respondent, suggests that the appellant might have been looking forward to some advantage from his participation because of an answer that he gave in his first interview he said that after Lai emigrated, every year he asked the appellant to give him a helping hand, and the appellant said that when he secured orders for Lai for goods manufactured in Macau, Lai worked out a commission for him. That answer really suggested that if the appellant should have been successful in the present transaction to get Lai to become a supplier to Wellcome Supermarket, then he, the appellant, might have received a commission from Lai. That might have been something which the appellant thought of, but it was never explicitly agreed between him and Lai. When the appellant did what he did, he had not been promised any advantages by Lai. AUTONUMOUT Burkett relies on the case of HKSAR v. Siu Man Kit, HCMA1128/2003 where Gall J had reduced a sentence of seven months imprisonment for a similar offence to a sentence of nine weeks imprisonment. In that case, an offer of \$30,000 was made to an engineer of a contractor company by a director, a major shareholder, of a sub contractor. Both contractors were doing installation of ceiling works for the Mass Transit Railway stations located at Yau Tong and Tseung Kwan O. AUTONUMOUT In the appeal before Gall J, counsel for the respondent acknowledged the fact that the offer was immediately rejected and no harm was done was a factor which might render the offence less serious than other cases of corruption. Counsel in that case also accepted that the starting point of nine months imprisonment was manifestly excessive. AUTONUMOUT Gall J considered the case of Secretary for Justice v. Kwan Chi Cheong, CAAR1/1999 where, on an application by the Secretary for Justice for a review of the order of a community service for a section 9 offence, the Court of Appeal set aside the community service order and replaced it with a sentence of three months imprisonment. In that particular case, the corruption was on a greater scale and took place over a longer period and the monies in that case were actually paid. However, that was an application for a review of sentence by the Secretary for Justice and the respondents in that case had entered pleas of guilty. AUTONUMOUT Gall J said that there was a clear difference in severity between that case and the case before him. Taking into account the fact that in the case before him, no monies were paid, the offer took place only on one occasion and that whilst there was a clear intention to generally keep the offeree happy, there was no suggestion of an intention to breach the contract rules with the MTR or to produce work which was substandard, Gall J reduced the sentence from seven months imprisonment to one of nine weeks, taking into account and giving credit to the appellant for the fact that he had a clear record. AUTONUMOUT Daryanani submits that that case was different from the instant case, in that in Siu s case the contract was already in place and the offer was to enable the sub contractor s works to be approved by the contractor without too many problems whereas in the instant case the offer was to secure an appointment with Wellcome Supermarket. That may be so, but in my view, the fact that in the present case the

appointment as a supplier of Chinese sausages had not been secured by Lai does not mean that the quality of the Chinese sausages, if the appointment had been secured, would have been any less than if no offers had been made to Nguyen. Nguyen clearly was not in a position to influence Wellcome Supermarket on which supplier should be appointed.

AUTONUMOUT The appellant is 56 years old. This was his first conviction. It was said that he was a family man who supported his family. He is described in the charge as a Sales Manager. AUTONUMOUT The clang of the prison gates would have had a very wholesome effect on this appellant. His receiving an immediate custodial sentence from the magistrate would have been a clear message to the community that anyone who commits a corruption offence, such as a section 9 offence, is facing an immediate custodial sentence. The length of any particular sentence of course depends on the particular facts of the case and on the particular circumstances of the defendant. In my view, an appropriate sentence for this appellant would be a sentence of about four and a half months imprisonment. Since the appellant has been in custody since 14 February 2007, and taking that into account and also taking into account a remission for good conduct, I order that the sentence which should be substituted should be one which would enable the appellant's immediate release from custody. The appeal against sentence is allowed to that extent. (Peter Nguyen) Judge of the Court of First Instance, High Court Mr Prakash L. Daryanani, SGC of Department of Justice, for HKSAR Mr Francis Burkett and Mr Jason Wong, instructed by Messrs Chan, Wong & Lam, for the A 1udk 1udk &`#\$ eH[; eH[; & 6" English.dot setup Microsoft Word 9.0 Judiciary Title Microsoft Word Document MSWordDoc Word.Document.8

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